NOS. 88-1398 AND 88-1462

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LUMAR MARINE, INC.,

Petitioner

VERSUS

JULES SIMEON, SR. AND IDA MAE GRIFFIN SIMEON, Wife of Jules Simeon, Sr.

Respondents

and

T. SMITH & SON, INC.

Petitioner

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Respondents

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Jules and Ida Mae Griffin Simeon, respectfully request that the Court deny the petition for writs of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 852 F.2d 1421 (5th Cir. 1988).

REASONS WHY THE PETITIONS SHOULD BE DENIED

I. UNDER MARITIME PRACTICE WHERE THE NEGLIGENCE OF THE JONES ACT EMPLOYER AND A GENERAL MARITIME LAW TORTFEASOR COMBINE TO INJURE A COMPLAINANT, THE TORTFEASORS ARE SOLIDARILY LIABLE, ESPECIALLY TO A SEAMAN WHERE THE ACCIDENT OCCURS IN STATE WATERS.

The Respondent, Mr. Jules Simeon, a seaman, received substantial injury. His Jones Act employer was 58% responsible; Lumar, the general maritime law tortfeasor, was assessed 32% of the fault and the complainant was 10% blameworthy. The accident occurred when Respondent Simeon's foot became caught in a running line and was nearly severed from his leg. The accident took place during a midstream ship unloading in the Mississippi River at New Orleans.

Under the maritime law joint tortfeasors are jointly liable. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 2756, 61 L.Ed.2d 521 (1979); *Cooper Stevedore Company v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953); *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 283, 72 S.Ct. 277, 278, 96 L.Ed. 318 (1952). Earlier decisions firmly implanted the joint liability rule in American maritime law. *The Sterling*, 106 U.S. 647, 1 S.Ct. 89, 90, 27 L.Ed. 98 (1882); *The Juanita*, 93 U.S. 337, 23 L.Ed. 930 (1876); *The Alabama*, 92 U.S. 695, 23 L.Ed. 763 (1876); *The George Washington*, 76 U.S. 513, 19 L.Ed. 787 (1870).

The circuit and district courts adhere to the maritime joint liability rule uniformly. *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1428-32 (5th Cir. 1988); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1543-48 (11th Cir. 1987); *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908, 913-18 (1st Cir. 1987); *Seal Offshore, Inc. v. American Standard, Inc.*, 777 F.2d 1042, 1045 (5th Cir. 1985); *Todd Shipyards Corporation v. Auto Transport, S.A.*, 763 F.2d 745, 756 (5th Cir. 1985); *McMillan Bloedel Ltd. v. Flintkote Co.*, 760 F.2d 580, 584-85 (5th Cir. 1985); *Central Rivers Towing v. City of Beardstown*, 750 F.2d 565, 574-75 (7th Cir. 1984); *Ebanks v. Great Lakes Dredge and Dock Co.*, 688 F.2d 716 (11th Cir. 1982); *Joiner v. Diamond M. Drilling Co.*, 688 F.2d 256 (5th Cir. 1982); *The M/V ELAINE JONES*, 480 F.2d 11, 30-31 (5th Cir. 1973); *Complaint of Sincere Navigation Corp.*, 447 F.Supp. 672, 674 (E.D.La. 1978); *Browne v. McDonnell Douglas Corp.*, 504 F.Supp. 514, 518 (N.D. Cal. 1980); *Missouri Pacific R.R. v. Star City Gravel Co.*, 452 F.Supp. 480, aff'd 592 F.2d 455 (8th Cir. 1979).

The claimed inequity of requiring one joint tortfeasor to pay more than his proportionate share of the total liability to an injured maritime employee has not disuaded the Court from following its joint liability rule.

In *Cooper Stevedore Company v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694, (1974), the plaintiff longshoreman slipped while loading a vessel as a result of a condition created on board by a stevedore at a prior port. The injured longshoreman, said the Court, could have recovered all of his damages from either one of the tortfeasors. *Cooper*, 417 U.S. at 114, 94 S.Ct. at 2178. In *Cooper*, the district court, unable to apportion the fault between the parties, divided it.

A shipowner who was responsible for but 25% of the negligence was required to respond for 100% of the damages in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 283, 72 S.Ct. 277, 278, 96 L.Ed. 318 (1952) and in *Edmonds, supra*, a jury concluded that a longshoreman who suffered total damages of $100,000 and was responsible for 10% of the total negligence resulting in his injury, could nevertheless recover 100% of his damages from a shipowner who was liable for but 20% of the fault. A co-employee of the employer contributed 70% to the fault. Thus, where the longshoreman himself was 10% at fault, a 20% responsible party, was required to respond in full for the damage. *Edmonds, supra*, 443 U.S. 258, 260, 99 S.Ct. at 2755, 2756.

In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 407-408, 74 S.Ct. 202 at 204 (1953), a ship's carpenter was injured because of the unseaworthiness of the vessel, the negligence of the charterer and the negligence of the carpenter's employer. The plaintiff himself was 17½% at fault. This Court on the basis of its *Halcyon* decision agreed that the negligent shipowner, whose vessel was also unseaworthy, must bear the entire amount of the damages in spite of the negligence of the employer of the carpenter.

The accident in this case occurred aboard a barge which was lashed to the side of a seagoing vessel anchored midstream in the Mississippi River. The accident happened in State waters. In Louisiana, joint liability (or solidarity as it is called in Louisiana) is the rule. Louisiana Civil Code Article 1794, formerly Civil Code Article 2091; *Narcise v. Illinois Central R. Co.*, 427 So.2d 1192, 1194-1195 (La. 1983). Historically, the Court has evinced a willingness to look to state law to supplement the historic admiralty rules. The *M/V "TUNGUS" v. Skovgaard*, 358 U.S. 588, 591 79 S.Ct. 503, 505-506, 3 L.Ed.2d 524 (1959); *Sea*

Land Services, Inc. v. Gaudet, 414 U.S. 573, 576, 94 S.Ct. 806, 810, 39 L.Ed.2d 9 (1974); *The M/V ELAINE JONES*, 480 F.2d 11, 30-31 (5th Cir. 1973).

Interestingly, in a Jones Act case involving Jones Act negligence and Louisiana land negligence, the parties were held jointly (solidarily) liable. *Joiner v. Diamond M Drilling Co.*, 688 F.2d 256 (5th Cir. 1982).

In the 11th Circuit, a Jones Act seaman was held entitled to look to one of two joint tort feasors for the entirely of his recovery and hence, the Jones Act seaman was entitled to a joint liability recovery. *Ebanks v. Great Lakes Dredge and Dock Co.*, 688 F.2d 716 (11th Cir. 1982), cert. denied, 460 U.S. 1083, 103 S.Ct. 1774, 76 L.Ed.2d 346 (1983).

The Jones Act, 46 USC Section 688, incorporates the Federal Employer's Liability Act (FELA) 45 USC Section 51, et seq., *Hopson v. Texaco, Inc.*, 383 U.S. 262, 86 S.Ct. 765, 766, 15 L.Ed.2d 740 (1966). The FELA jurisprudence has looked to state law at the scene of the accident to determine whether the liability should be joint. *Narcise v. Illinois Central R. Co.*, 427 So.2d 1192 (La. 1983); *Missouri Pacific R.R. v. Star City Gravel Co.*, 452 F.Supp. 480, aff'd 592 F.2d 455 (8th Cir. 1979).

The fact that the plaintiff, Mr. Simeon, was 10% at fault does not in any way affect his right to recovery of the total amount of his damages, less his contributory portion from either of the tortfeasors. *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987); *Drake Towing Co. v. Meisner Marine Construction Co.*, 765 F.2d 1060, 1067 (11th Cir. 1985); *Gele v. Chevron Oil Co.*, 574 F.2d 243, 249-51 (5th Cir. 1978); *Empire Seafoods, Inc. v. Anderson*, 398 F.2d 204, cert. denied, 393 U.S. 983, 89 S.Ct. 449, 21 L.Ed.2d 444 (5th Cir. 1968).

The argument is made by Smith that Jones Act negligence and ordinary general maritime law negligence are different and, therefore, there cannot be joint liability based upon *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). The Fifth Circuit opinion in this case, *Simeon v. T. Smith, supra*, at 1430-1431, effectively disposes of this argument. *Sieracki* rested on unseaworthiness which, as all maritime attorneys know, is a species of absolute or strict liability independent of fault. Jones Act liability depends on fault as does ordinary negligence under the general maritime law. The Fifth Circuit noted that both the Jones Act and maritime negligence are fault based and therefore beyond the *Sieracki* rule. The Fifth Circuit noted that no precedent supported the argument of Smith and that, to the contrary, the First and Eleventh Circuits support the proposition that a tortfeasor responsible for Jones Act negligence and a tortfeasor responsible for negligence under state or general maritime law are jointly liable. *Joia v. Jo-Ja Service Corp., supra*, and *Ebanks v. Great Lakes Dredge and Dock Co., supra*. It is noteworthy that in this case, the jury concluded that Smith's vessel was not unseaworthy, but rather Smith was responsible for Jones Act fault only. In the jury's mind, Jones Act fault and unseaworthiness were clearly distinguished. For the views of Smith to prevail, Jones Act fault and unseaworthiness must be one and the same. This is clearly not the case.

It is the general rule at common law that when two or more persons tortiously cause harm, each is liable to the injured party for the entire harm and each may be sued separately and held liable for all of the damage. Restatement Torts 2d Section 875; *McMillan Bloedel, Ltd. v. Flintkote Co.*, 760 F.2d 580 (5th Cir. 1985).

Considering the fact that admiralty courts liberally interpret the law for the benefit of seamen, it would be a drastic

reversal of maritime jurisprudence and fundamental assumptions not ot allow joint liability under the facts of this case. *See Cosmolitan Shipping Co. v. McCallister*, 337 U.S. 783, 69 S.Ct. 1317, 1321 (1949); *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 58 S.Ct. 651, 654 (1939); *Joia v. Jo-Ja Service Corp., supra* at 917. In fact there is nothing in the Jones Act to suggest that joint liability is not the rule. The law of admiralty, the law of Louisiana, the Common Law and the general maritime policy favoring seamen all would dictate that the rule of joint liability govern this case.

The theoretical basis of joint liability at common law has two roots:

a. a tort feasor is responsible for *all* consequences of his acts;

b. a plaintiff should not be denied the possibility of collecting the full amount of his judgment.

Prosser states that a tortfeasor at common law became responsible for the entire damage regardless of the participation by others:

> Entire Libility
>
> Quite apart from any question of vicarious liability or joinder of defendants, the common law developed a separate principle, that a tortfeasor might be liable for the entire loss sustained by the plaintiff, even though his act concurred or combines with that of another wrongdoer to produce the result–or, as the courts have put it, that the defendant is liable for all consequences proximately

> caused by his wrongful act. Prosser on Torts 240 (2nd Ed. 1955).

The second ground is set forth in ALR 3rd:

> The traditional and overwhelming weight of authority is to the effect that joint tortfeasors (often including those who, by loose definition, may properly be found jointly and severally liable)[12] may not, in the absence of statute having a different effect,[13] have apportioned among them the compensatory damages incorporated in the judgment establishing their liability, the underlying theory ordinarily being that the plaintiff should not be denied the possibility of collecting the full amount of his judgment from any one of the defendants. 46 ALR 3rd 801 at 808 (footnotes omitted).

See also, *Washington Gas Light Co. v. Lansden*, 172 U.S. 534, 19 S.Ct. 296, 303 (1899); *Hooks v. Vet*, 192 F. 314 (5th Cir. 1911).

Petitioners argue strongly that the concept of joint liability as a policy is under strenuous attack in the United States. While this may be, there is a superior, humanitarian policy responsive to the needs of seamen. To deny a seaman the benefits of joint liability would run counter to the expressed policy of the Congress and of the numerous decisions of the Court protecting, in a paternal way, the rights of seamen.

Seamen are the wards of the admiralty. The Jones Act is solicitous of their welfare. Where the negligence of a Jones Act employer combines with a potentially impecunious

tug operator, the Jones Act employee should not be denied a full recovery from his employer.

II. EQUITY IS UNAVAILING TO SMITH.

Smith argues that Jules Simeon should have proceeded *in rem* against the M/V TAKO BANDIT and his failure to seize and sell that vessel precludes his right to seek joint liability. There is a suggestion that Simeon had a right which has been lost and forsaken. Nothing could be further from the truth. Simeon has a preferred maritime lien since his lien arises from a tort. 46 USC Section 31301 formerly 46 USC Section 953. The preferred maritime lien of Mr. Simeon takes priority over any mortgage lien. 46 USC Section 31326 formerly 46 USC Section 953. Mr. Simeon's lien will follow the vessel and it may ultimately become necessary for Mr. Simeon to assert this lien. By the same token, nothing precluded Smith from asserting a lien or seizing the M/V TAKO BANDIT.

Smith contends that it was somehow incumbent upon Mr. Jules Simeon to deposit substantial sums with the United States Marshal ($5,000 or $10,000) to defray costs of maintaining a vessel during seizure and to proceed with a foreclosure sale of the vessel in order to protect his rights. Nothing in law suggests that a plaintiff must do this to protect his right to seek joint liability on the part of his Jones Act employer.

Smith also argues as though it were being called upon to pay some kind of damages for which it was not responsible under its Jones Act liability. This is incorrect as a matter of law. Smith is liable not only for lost wages, past and future, but is liable also for medical expenses and pain and suffering sustained by Mr. Simeon. *Petition of United States Steel Corporation*, 436 F.2d 1256, cert. denied, 402 U.S. 897, 91 S.Ct. 1649, 1660, 29 L.Ed.2d 153, rehearing denied,

403 U.S. 924, 940, 91 S.Ct. 2227, 2247, 29 L.Ed.2d 703, 720 (6th Cir. 1970); *Downie v. United States Lines Co.*, 359 F.2d 344, cert. denied, 385 U.S. 897, 87 S.Ct. 201, 17 L.Ed.2d 130 (3rd Cir. 1966). Smith is not being asked to respond for damages it would not have to pay under the Jones Act.

In further considering the equities of this situation, it should not be forgotten that Lumar and the M/V TAKO BANDIT did not participate in this unloading operation at the behest of complainant Simeon. Rather, Lumar and the M/V TAKO BANDIT were employed by T. Smith & Son, Inc. It was T. Smith & Son who should have seen to the solvency and responsibility of its contractor. Smith involved Lumar in the unloading operation and had a right to expect a workmanlike performance from Lumar and the M/V TAKO BANDIT.

Smith had an adequate legal remedy at law, precluding any claim for equitable relief. Smith might have proceeded under its contractual rights directly against Lumar; Smith might have proceeded *in rem* against the tug and protected itself against the potential insolvency of Lumar. See, *Schoenthal v. Irving Trust Company*, 287 U.S. 92, 94, 53 S.Ct. 50, 51 77 L.Ed. 185 (1932). T. Smith & Son could have protected itself legally vis-a-vis Lumar and cannot now be heard to complain. *Manufacturers Finance Company v. McKey*, 294 U.S. 442, 448-449, 55 S.Ct. 444, 447, 79 L.Ed 982 (1935).

III. LUMAR SHOULD HAVE CONTRIBUTION FROM SMITH FOR THE PREJUDGMENT INTEREST AND LOSS OF CONSORTIUM DAMAGES IT MAY BE REQUIRED TO PAY; HOWEVER, TO GRANT A WRIT ON THIS GROUND AND DELAY THE SIMEONS FURTHER WOULD BE UNCONSCIONABLE.

Lumar in Point I of its petition for a writ of certiorari seeks contribution for the damages it is required to pay to the Simeon family. This concerns rights of Lumar against Smith. The Simeons are strangers to that controversy, however, the Simeons support Lumar in its contention that it has a right to contribution from its joint tortfeasor as to the claim for contribution with respect to prejudgment interest and loss of consortium. But the Simeons cannot sustain further delay in their recoveries.

Mrs. Simeon contended below that indeed Smith and Lumar were joint tortfeasors. She contended that a spouse has an independent general maritime law cause of action for loss of consortium. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673, 64 L.Ed.2d 284 (1980).

The general maritime law includes not only actions based upon unseaworthiness but also actions based upon negligence. In this case Ida Mae Simeon sued both tortfeasors. T. Smith was held liable for Jones Act negligence with respect to her husband. The facts of the case indicate clearly that the negligence of T. Smith was not only slight negligence but was certainly ordinary negligence as well and since the spouse's action sounds in admiralty, the jurors should have found that there was ordinary negligence on the part of T. Smith. There was negligence on the part of Lumar. As to Ida Mae Simeon, both Lumar and T. Smith were guilty of maritime negligence.

Nothing emanating from the Jones Act as such immunizes the employer from the negligence action of the spouse. Indeed, in *Alvez, supra*, and in *Gaudet, supra*, the employer was insulated from a negligence action by the employee. This did not, however, mean that the wife did not have a maritime right, including both unseaworthiness and negligence, as against the employer tortfeasor. In *Alvez, supra*, at 446 U.S. 282-83, 100 S.Ct. 1678, the Court recognized the liberality which should attend the rights of the spouse. Fifth Circuit jurisprudence denied the claims of Ida Mae Simeon against her husband's employer for negligence, but not unseaworthiness. *Tullos v. Resource Drilling, Inc.*, 750 F.2d 380, 385-86 (5th Cir. 1985); *Cruz v. Hendy International Co.*, 638 F.2d 719 (5th Cir. 1981).

In *Cruz, supra*, at 725, Judge Rubin recognized the non-preclusive effect of the Jones Act and the possibility that Jones Act spouses might have less recovery than non-Jones Act spouses. This would seem incongruous given the thinking in *Gaudet* and *Alvez, supra. Gaudet* and *Alvez* did not exclude the spouse's right to sue for negligence and in this case Mrs. Simeon would be entitled to protection from negligence on the part of both T. Smith and Lumar.

Hence, because the general maritime law includes an action for negligence and because T. Smith was negligent, Ida Mae Simeon should have been entitled to recover from both T. Smith and Lumar as joint tortfeasors and, therefore, Lumar's claim for contribution is valid.

But the Simeons are not rich people. The accident occurred on September 27, 1981. Suit was filed just before the third anniversary of the accident. The Simeons cannot afford the continued delays which the grant of the writ in this instance would entail.

IV. THE SIMEONS SHOULD BE ENTITLED TO RECOVER ALL OF THEIR DAMAGES FROM LUMAR.

In Point II of its petition, Lumar argues that since it was responsible for 32% of the negligence, it should be responsible for no more than 32% in damages. This thinking runs counter to the historic thinking of this Court as developed in Part I of this brief. Lumar contends that to adhere to a rule of joint liability is to undercut the concepts of comparative fault.

Circuit Judge Carolyn D. King eloquently set forth the reasons for protecting the injured seaman with the doctrine of joint liability. Judge King wrote in a concurrence in this case:

> Because the Supreme Court has never questioned the wisdom of the traditional rule of joint and several liability, nor retreated from the policy behind the rule, the choice of the courts of appeals has also been clear: They have refused to limit a contributorily negligent seaman's recovery of damages under general maritime law to an amount less than an amount which will make the seaman whole—that is, the total amount of the judgment minus only that amount which represents the seaman's contributory negligence. *See, e.g., Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1545-48 (11th Cir.1987) (holding that "the philosophy governing *Edmonds* is clear: any inequity which results from the implementation of a seaman's damage award should be borne by the tortfeasors rather than the seaman himself," even where the seaman was contributorily

negligent); *Joia v. Jo-Ja Serv. Corp.*, 817 F.2d 908, 916-17 (1st Cir.1987) (rejecting proportionate liability under both the Jones Act and general maritime law because of the "inequity" which would result from decreasing a contributorily negligent seaman's damages).

It actually comes as no surprise to me that both the Supreme Court and the circuit courts have aligned themselves with a policy of ensuring a seaman's full recovery, regardless of the burden it places upon maritime defendants. That policy coincides with the general policy which has long guided the course of maritime law as it relates to the rights of seamen: "Seamen, of course, are wards of admiralty whose rights federal courts are duty-bound to jealously protect." *Bass v. Phoenix Seadrill/78 Ltd.*, 749 F.2d 1154, 1160-61 (5th Cir.1985); *see, e.g., Vaughan v. Atkinson*, 369 U.S. 527, 531-33, 82 S.Ct. 997, 999-1001, 8 L.Ed.2d 88 (1962); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244-48, 63 S.Ct. 246, 250-52, 87 L.Ed. 239 (1942). Support for the traditional rule of joint and several liability comes from more, therefore, than just a tort policy of making plaintiffs whole; it comes also from a more general policy under maritime law of favoring and protecting seamen. While the traditional rule is, therefore, fully consonant with general maritime law, the rule of modified joint liability–supported, as it is, by a policy which eschews the protectionism that general maritime law embraces–is in conflict

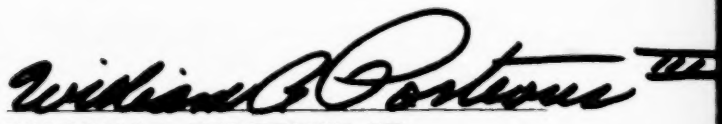
with the maritime law's general philosophy concerning seamen's rights.

Simeon v. T. Smith & Son, Inc., supra at 1455.

CONCLUSION

For these reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,



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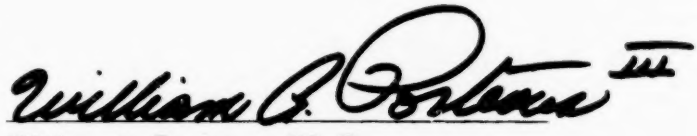
I hereby certify that on this 18th day of May, 1989, three copies of the Respondents' Brief in Opposition to a Petition for Writ of Certiorari were mailed, postage pre-paid, to each of the following:

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I further certify that all parties required to be served have been served.



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